TABLE OF CONTENTS

	PAGE
Statement of Facts	1
Reasons for Denying the Writ	5
I. The Court found that Debtor's Petition was not filed in "good faith" because the Chapter X proceedings did not give greater benefit to the creditors and stockholders than the pending mortgage foreclosure	5
II. The Court could make such finding and exclude certain of Debtor's property from the Chapter X proceeding, which in effect dismissed its petition, on short notice to the parties	11
Conclusion	14

APPENDIX

Application for order excluding property from Chapter 10 and dismissing proceedings, No. BK-74-434 in the United States District Court for the Western District of Oklahoma	i-ii

TABLE OF AUTHORITIES

CASES:

Arey and Russell Lumber Company, Inc. v. American National Bank and Trust Company of Danville, Virginia, 201 F.2d 508 (4th Cir. 1953)	13-14
Colorado Trust Deed Funds, Inc., In re, 311 F.2d 288 (10th Cir. 1962)	11
DCA Development Corporation, et al., Debtors, In re, 489 F.2d 43 (1st Cir. 1973)	9, 12

TABLE OF AUTHORITIES CONTINUED PAGE

First National Bank of Wellston v. Conway Road Estates Company, 94 F.2d 736 (8th Cir. 1938) 13

Janif Shopping Center, Inc. v. Chase Manhattan Bank, 282 F.2d 211 (4th Cir. 1960) 13

Loeb Apartments, In re, 89 F.2d 461 (7th Cir. 1937) 6-7

Marine Harbor Properties v. Manufacturers Trust Company, N.Y. 1942, 63 S.Ct. 93, 317 U.S. 78; 87 L.Ed. 64, 51 Am. Bankr. Rep. N.S. 1, rehearing denied 63 S.Ct. 254, 317 U.S. 710, 87 L.Ed. 566 ..... 6, 7, 9-10, 12

Metropolitan Realty Corporation, In re, 433 F2d 676 (5th Cir. 1970), cert. denied 401 U.S. 1008, 91 S.Ct. 2151, 28 L.Ed.2d 544 (1971) 6

Southern Land Title Corporation, In re, 301 F.Supp. 379 (1969) 6

Suburban Properties, Inc., In re, 110 F.2d 438 (7th Cir. 1940) 7

U. S. Realty and Implement Company, In re, 153 F.2d 853 (2nd Cir.) 10

STATUTES:

11 U.S.C. 541 5
11 U.S.C. 546 6
11 U.S.C. 546(4) 9
11 U.S.C. 548 8
11 U.S.C. 607 12
11 U.S.C. 713(2) and 715 12

In the
Supreme Court of the United States
OCTOBER TERM, 1975

No. 75-367

IN THE MATTER OF PARKER SQUARE, INC.,
a Corporation,
Bankrupt.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS TENTH CIRCUIT

STATEMENT OF FACTS

On March 10, 1965, as security for a note, Petitioner herein, Parker Square, Inc., gave Respondent herein, American National Bank and Trust Company of Shawnee, Shawnee, Oklahoma, a mortgage on real property. On July 11, 1973, Bank filed a Petition against Debtor in the District Court of Pottawatomie County, Oklahoma, Case Number C-73-260, based on the note and mortgage dated March 10, 1965, seeking a money judgment and foreclosure and sale of the mortgaged property. On October 29, 1973, judgment was rendered by the State Court against Debtor on Bank's Motion for Summary Judgment for the sum of $83,378.87 plus interest. On November 21, 1973, Debtor's Motion for New Trial was overruled. On December 7, 1973, Bank caused Execution and Order of Sale to be issued by the

Court Clerk. Notice of Sale was first published December 21, 1973, and appraisement was returned in the amount of $159,000.00. On February 6, 1974, the State Court denied confirmation of sale because the appraisal did not include the car-wash facilities. On February 13, 1974, Bank caused Execution and Order of Sale to again issue, notice of sale was published on February 15, 1974, giving notice that on March 19, 1974, at 10:00 a.m. the mortgaged property of Debtor would be sold to satisfy the judgment, and appraisement was returned in the amount of $171,000.00. On March 8, 1974, Petition to Vacate Judgment filed by Debtor on January 30, 1974, was overruled and Petition dismissed.

Then on March 15, 1974 (*Friday, at 3:55 p.m.*), Debtor filed its Petition for Proceedings under Chapter 10 of the Bankruptcy Act in Case Number BK-74-434 in the United States District Court for the Western District of Oklahoma. Judge Bohanon signed on behalf of Judge Eubanks an *ex parte* Order approving the Petition and continuing the Debtor in possession of the mortgaged property and enjoining its sale.

On March 18, 1974 (Monday), Sidney R. Clarke III, attorney for Bank, told the attorney for Debtor in the State Court proceeding, Irvin Owen, that he intended, that afternoon, to request Judge Bohanon to exempt the State Court foreclosure proceeding from the Chapter 10 Bankruptcy proceeding. That afternoon, Mr. Clarke, with Mr. Ken Spears, an office associate of B. J. Brockett, the then attorney for Debtor in the Bankruptcy proceeding being present, orally requested Judge Bohanon to dismiss the Bankruptcy proceeding and allow the State Court foreclosure sale to be

held on the following day as scheduled. The Judge agreed with Bank's attorney, requested he prepare an Order for the Judge's signature, and caused to be entered on the Docket a minute showing his Order excluding the State foreclosure sale from the Chapter 10 proceeding.

On March 19, 1974, prior to 10:00 a.m., Sidney Clarke III appeared before Judge Bohanon with a written application and Order to Exclude Property from Bankruptcy Proceeding for signature. C. O. Parker, President of Debtor, and B. J. Brockett, then attorney for Debtor, were present and the Motion of Bank heard on the previous day was discussed again. Judge Bohanon affirmed his decision in favor of Bank, but did not sign the Order presented by Mr. Clarke because the language therein dismissed the entire Chapter 10 proceeding when Judge Bohanon desired only to order property in the State Court foreclosure proceeding excluded from the Chapter 10 proceeding. Judge Bohanon ordered that the foreclosure proceeding be excluded and directed Mr. Clarke to prepare an Order to that effect. The Order Vacating Order Approving Petition and Continuing Debtor in Possession was presented to Judge Bohanon after noon, was signed by him and filed in the case. At 10:00 a.m., the Sheriff of Pottawatomie County, in the State Court proceeding, sold said mortgaged real property to Windsor Finance Corporation for $114,000.00 and filed his Motion to Confirm.

On March 22, 1974, the Chapter 10 proceeding was referred to Judge David Kline except for certain excluded matters. On March 26, 1974, the State Court, after a hearing at which all parties and their attorneys were present, over-

ruled Debtor's Motion to Delay Confirmation of Sale, sustained Plaintiff's Demurrer to Debtor's evidence in support of Debtor's oral objections to Confirmation of Sale and expressly held therein "that the sale price of said property was not so grossly inadequate as to shock the conscience of the Court and that Debtor's right to redeem is expired, nor has he made a legal and sufficient exercise of said right of redemption." The Court confirmed the Sheriff's Sale of March 19, 1974, and ordered disbursements to be made on April 8, 1974, and ordered that the purchaser, Windsor Finance Corporation, be given possession of said property. On April 4, 1974, Judge Kline ordered the State Court Court Clerk to temporarily delay disbursing the proceeds of said sale and set a show cause hearing for April 16. On April 5, 1974, the State Court held a hearing on the various motions filed by Debtor, with all parties and their attorneys present, and denied Debtor's request to pay off the judgment and redeem the property and denied Debtor's request to reconsider confirmation of Sheriff's sale. A copy of Judge Kline's order was given to Bank's attorneys and called to the attention of the State Court and the State Court ordered that, pending the show cause hearing in the Bankruptcy Court, disbursement could be made only if Judge Kline's order was vacated. On April 9, 1974, Judge Kline vacated his previous order delaying disbursement of sale proceeds. On May 14, 1974, Judge Kline declined jurisdiction concerning Debtor's Motion to Reconsider filed April 18, 1974. On June 6, 1974, Debtor's Motion to Reconsider the Order of March 19, 1974, by Judge Bohanon allowing the State Court foreclosure sale was overruled. Bank's Motion to Dismiss the Chapter 10 proceeding was sustained.

July 5, 1974, Debtor filed Notice of Appeal to the United States Court of Appeals for the 10th Circuit. On August 8, 1974, there was filed an Order by Judge Bohanon that the Court is without jurisdiction to take action on Debtor's Motion to Correct the Court's Order of June 6, 1974, dismissing the Chapter 10 proceeding and allowing the State Court to proceed.

This concluded the District Court proceedings.

REASONS FOR DENYING THE WRIT

I.

THE COURT FOUND THAT DEBTOR'S PETITION WAS *NOT* FILED IN "GOOD FAITH" BECAUSE THE CHAPTER X PROCEEDINGS DID NOT GIVE GREATER BENEFIT TO THE CREDITORS AND STOCKHOLDERS THAN THE PENDING MORTGAGE FORECLOSURE.

The Petition for Relief under Chapter 10 was filed by Debtor (Petitioner) and the Order Approving Petition and Retaining Debtor in Possession was signed by Judge Eubanks on *ex parte* application and after review of only the Petition without hearing evidence or argument by the Bank.

It is provided in 11 U.S.C. 541 that:

> "Upon the filing of a Petition by a Debtor, the Judge shall enter an Order Approving the Petition, if satisfied that it complies with the requirements of this Chapter and has been filed in good faith, or dismissing it if not so satisfied."

The burden is on the Debtor to convince the Court that the Petition for Reorganization has been filed in good faith;

Marine Harbor Properties v. *Manufacturers Trust Company*, N.Y. 1942, 63 S.Ct. 93, 317 U.S. 78; 87 L.Ed. 64, 51 Am. Bankr. Rep. N.S. 1, *rehearing denied* 63 S.Ct. 254, 317 U.S. 710, 87 L.Ed. 566.

What is "good faith"? 11 U.S.C. 546 provides:

> "Without limiting the generality of the meaning of the term 'good faith' a Petition shall be deemed not to be filed in good faith if . . . §3—it is unreasonable to expect that a plan of reorganization can be effected or §4—a prior proceeding is pending in any Court and it appears that the interests of Creditors and Stockholders would be best subserved in such prior proceeding."

In re Metropolitan Realty Corporation, 433 F.2d 676 (5th Cir. 1970), *cert. denied* 401 U.S. 1008, 91 S.Ct. 1251, 28 L.Ed.2d 544 (1971):

> "The statute expressly states that the generality of the meaning of the term 'good faith' is not to be limited by the enumeration set down in Section 546."

In re Southern Land Title Corporation, 301 F.Supp. 379 (1969), at page 428:

> " 'Good faith' implies an honest intent and genuine desire on the part of the Petitioner to use the statutory process to effect a plan of reorganization and not merely as a device to serve some sinister or unworthy purpose such as, for example, merely to serve as a delaying tactic."

In re Loeb Apartments, 89 F.2d 461 (7th Cir. 1937):

> "If it is obvious that a debtor is attempting unreasonably to deter and harass creditors in their bona fide

> efforts to realize upon their securities, good faith does not exist."

In re Suburban Properties, Inc., 110 F.2d 438 (7th Cir. 1940):

> "In determining whether the Petition is filed in good faith, the fact that there is a state court foreclosure suit pending which has proceeded far on its way toward final adjudication might well be considered."

If the Trial Judge is not satisfied that the Petition was filed in good faith, he must dismiss the Petition; see *Marine Harbor Properties, Inc.* (above).

At the time of entering the Order of March 18, exempting certain real property from the Chapter 10 proceedings, the Court had before it the Petition of Debtor and the Application to Exclude of Bank. Debtor argues that the Judge's only possible reason for exempting the real property from the Bankruptcy proceedings and allowing the State Court foreclosure sale was that the Debtor only filed to escape prior pending State proceedings. Debtor cites *Marine Harbor* (above) as authority for the proposition that in determining "good faith," Debtor's desire to escape from prior State proceedings is immaterial. But *Marine Harbor* is not like the instant case because there a State Court tried and failed to implement a reorganization plan. The Creditors' representative, a trustee, instituted foreclosure proceedings in State Court. Several months later, the Debtor filed a Petition under Chapter 10 of the Bankruptcy Act. The Trustee moved to dismiss the Petition because it was not filed in good faith. The trial court denied the motion. The Court of Appeals held that the Debtor's Petition was not

filed in good faith because the Debtor was seeking to escape the jurisdiction of the State Court which was attempting to reorganize the Debtor. The Supreme Court reversed saying that the escape factor was immaterial, and, at page 96, that "Congress in effect directed the bankruptcy courts not to approve petitions under Chapter 10 in such cases unless it appeared that the interests of creditors and stockholders would not be best subserved in the prior proceedings," and, at page 97, that the Petitioner "must demonstrate at least in some substantial particular the prior proceedings withhold or deny creditors or stockholders benefits, advantages, or protection, which Chapter 10 affords."

In the instant case the judgment was entered against the Debtor in October. A Sheriff's Sale was had and set aside in January. A second Sheriff's Sale was scheduled and the Court, after hearing the application of the Debtor on Monday to exempt the foreclosure proceeding, saw that the Debtor was making a last-ditch attempt to stop the foreclosure sale when all his efforts in State Court had failed. Only a Chapter 10 proceeding, because of the automatic injunction provisions of 11 U.S.C. 548, would allow the Debtor to stop the mortgage foreclosure. The Court could see that the Debtor had had many months to exercise its right of redemption under State law and pay off the note or the judgment and redeem the property, but had not been able to do so and alleged no facts showing it could do so in the future, but was merely trying to delay and harass the Bank's foreclosure proceeding (pages 13-14, Vol. I, Record on Appeal). Throughout Debtor's Petition (page 6, Vol. I, Record on Appeal) and in its argument it is obvious that the motivation of the Debtor was not to benefit creditors

and stockholders but only to secure additional time in hopes of finding financial backing to redeem the property. In the case of *In re DCA Development Corporation, et al., Debtors,* 489 F.2d 43 (1st Cir. 1973), the Court dismissed the petition for reorganization because debtor did not show a reasonable prospect of success in reorganization under 11 U.S.C. 546(4) where the evidence showed debtor could not obtain financing and had no definite prospects for such. In this case, after hearing Bank's Application, the Court decided that the Debtor had not satisfied its burden of proof in showing a good faith filing of its Petition. There appears nothing in the record on behalf of Debtor to indicate that reorganization would be beneficial to Creditors and Stockholders in any way which the State mortgage foreclosure could not provide *except* that it would delay the foreclosure and give Debtor additional time to attempt to raise money to redeem the property. The Court said in *Marine Harbor* that in that case there was no showing that the State foreclosure proceeding would not as adequately protect the interests of the Creditors after sale as a Chapter 10 reorganization would do, and that in view of the burden on Debtor the Bankruptcy Court would not be warranted in assuming that a state foreclosure proceeding on behalf of first mortgage creditors is inadequate by Chapter 10 standards. The Court said at page 98:

> "If there were a showing, for example, that the property was worth more than the amount of first mortgage indebtedness and it appeared that that excess value would be lost to the junior interests in the state proceedings or that the state proceedings were less adequate by reorganization standards than the bankruptcy court to protect such interests approval of the petition

> clearly would be justified whether filed by the debtor or by creditors. But, no such showing was made. Hence, it was not established that continuation of the state proceedings would deny the junior creditors any benefits which Chapter 10 would afford them."

In the instant case, the court was aware that the value of the real property exceeded Bank's claim and preserved for junior creditors any surplus over and above that needed to pay off Bank's judgment by impounding the surplus with the State Court Clerk (page 28, Vol. I, Record on Appeal).

Debtor claims in its Reason Number 2 that the Court erred in excluding the mortgaged property from the Chapter 10 proceeding and cites the case of *In re U. S. Realty and Implement Company*, 153 F.2d 853 (2nd Cir.) (which has not been cited to date in any opinion of a court of record). In that case, the Court had already decided that the Petition had been filed in good faith, had received a plan for reorganization and was refusing to enforce the trustee's promise to let the Bank foreclose. It is not analogous to the instant situation where the Court excluded the property being foreclosed and eventually dismissed the entire petition because of a lack of good faith in its original filing.

Debtor argues that the Court should have retained the real property for as long as necessary to determine whether junior creditors can be benefited without permanent loss to the secured creditor, but, in the instant case, the trial court did consider this matter when it decided further delay would be useless and allowed the property to be sold, but restrained, for the benefit of junior creditors, all proceeds over the amount necessary to pay the Bank.

It should be remembered that the Bank was, on March 18, 1974, both the largest and only significant creditor of and a substantial stockholder in Debtor corporation, and *as both* opposed any delay in the foreclosure sale (page 14, Vol. I, and pages 12-15, Vol. III, Record on Appeal). The method of better serving the interests of the stockholders and creditors would be the foreclosure proceeding which Bank as stockholder and creditor desired.

II.

THE COURT COULD MAKE SUCH FINDING AND EXCLUDE CERTAIN OF DEBTOR'S PROPERTY FROM THE CHAPTER X PROCEEDING, WHICH IN EFFECT DISMISSED ITS PETITION, ON SHORT NOTICE TO THE PARTIES.

The "good faith" filing of the petition may be challenged by Motion to Dismiss the Petition and formal pleadings and opposition are not necessary for the Court to determine the question of "good faith." See *In re Colorado Trust Deed Funds, Inc.*, 311 F.2d 288 (10th Cir. 1962). Bank's Oral Application of March 18th and Written Application of March 19th were the only expedient methods by which Bank could bring the issue before the Court since foreclosure sale was already set for the morning of the 19th. Debtor complains that the Court reversed its approval of the Petition without an Answer being filed by Bank and prior to the April 22nd hearing date set in the Order Approving Petition, dated March 15th, and did so after a hearing on March 18th at which Debtor was not present and a hearing again on the morning of March 19th when both Debtor's President and attorney were present, but did not have adequate notice thereof. But Bank's Application to

Exclude of March 19th is an Answer because it denies the allegations in Debtor's Petition and requests affirmative relief. See Appendix A.

Debtor complains that it did not receive proper notice and so was deprived of a fair opportunity to present its position. The *Marine Harbor* case puts the burden of proof on the Debtor. Debtor had an opportunity to present its need for reorganization in its Petition, and in this case, also on the morning of March 19th. It is, of course, not generally good practice to make oral applications to the trial court either without notice or upon short notice to the opposing party, but here such procedure was the only method which would allow the Court to make a decision prior to the foreclosure sale—a sale which had been pending upon Order of a State Court and after publication notice for over one month. If the Court did not have the power (but Debtor cites no authority to that effect) to modify its own procedural orders or hear evidence and argument on short notice to litigants, then considerable injustice would be done. In this case, the Debtor enjoys the right to have a restraining order issued at the last minute to prevent a foreclosure sale in the State Court and upon only his *ex parte* petition, but Debtor would deny to the Bank an opportunity to show to the Judge that the sale should not be restrained. 11 U.S.C. §607 provides that the Judge may control notice to the parties but does not require any given period of time for advance notice. Citing 11 U.S.C. Sections 713(2) and 715, the Court in *In re DCA Development Corporation* (above) said (p. 46) that even 5 hours' notice of a hearing was sufficient under its facts because in determin-

ing adequacy of notice and opportunity for hearing in bankruptcy proceedings the statutes merely require what is reasonable and appropriate in each particular case and the court "must balance the individual's interest in adequate procedure against the overall interest of efficient, final resolution of claims." Even if Debtor did not have much advance notice, the record indicates that Debtor's President and its attorney *were present* on the 19th of March. Time for legal research was not necessary as the matter decided by the Court was a factual one concerning the good faith filing of the Petition.

The Court is not required to take evidence on the issue of "good faith" if such can be resolved on the Petition itself and matters of record before the Court. See *Janif Shopping Center, Inc.* v. *Chase Manhattan Bank*, 282 F.2d 211 (4th Cir. 1960). As soon as the lack of good faith affirmatively appeared the Court acted properly in dismissing the Petition even though the plan stage had not been reached. *First National Bank of Wellston* v. *Conway Road Estates Company*, 94 F.2d 736 (8th Cir. 1938). The filing of a Petition for Reorganization under Chapter 10 being used to delay a foreclosure sale in State Court was encountered by the 4th Circuit Court of Appeals in *Arey and Russell Lumber Company, Inc.* v. *American National Bank and Trust Company of Danville, Virginia*, 201 F.2d 508 (4th Cir. 1953), wherein the Creditor, a Bank, advertised secured property for sale and the debtor, for the purpose of delaying the sale, filed a petition for an arrangement under Chapter 12 of the Bankruptcy Act, which petition was dismissed. The creditor then advertised the property for sale again and the debtor promptly filed a petition for reorganization under Chapter

10. The Court of Appeals said the Petition was properly dismissed by the trial court as not having been filed in good faith, saying:

> "the manifest purpose of the filing was to obtain just such an extension of the indebtedness secured by the deed of trust as had been sought in the Chapter 12 proceeding in which Congress had seen fit to deny to corporate debtors. Since the entire secured indebtedness was held by a single creditor that had clearly indicated that it would not grant any extension it was unreasonable to expect that a plan of reorganization could be affected."

CONCLUSION

The trial court properly concluded that giving Debtor more time to try and borrow money to pay the Bank by allowing a last-minute stay of the State Court mortgage foreclosure and the presentation of a plan of reorganization did not offer greater benefit to Creditors and Stockholders (Bank having the largest claim and owning almost one-half the stock) than the pending mortgage foreclosure and that Debtor had no right to present a plan of reorganization when the State Court proceeding better served the interests of those Creditors and Stockholders. This decision and its affirmation by the Court of Appeals, Tenth Circuit, was not a departure from the usual and accepted judicial proceedings but was in conformity with established law as shown by the authorities cited. The Court of Appeals emphasized that, under the facts of this case, Chapter X did not afford to creditors or stockholders some "benefits, advantages, or protection" which the state mortgage foreclosure denied.

The Court's statement that "although the manner in which these proceedings were handled is most unsatisfactory, . . ." referred to the actions of Debtor rather than Bank.

The Respondent Bank prays that the Petition for a Writ of Certiorari herein be denied and the cause not reviewed by this Court.

Respectfully submitted,

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(405) 275-1045

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Counsel for Respondent

October, 1975

APPENDIX

FILED
MAR 19 1974
REX B. HAWKS
CLERK, U. S. DISTRICT COURT
BY .....
Deputy

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA

In the Matter of	)	IN PROCEEDINGS FOR
	)	THE REORGANIZATION
PARKER SQUARE, INC.,	)	OF A CORPORATION
a corporation,	)	
	)	
Debtor.	)	NO: BK-74-434

APPLICATION FOR ORDER EXCLUDING PROPERTY FROM CHAPTER X AND DISMISSING PROCEEDINGS

Comes now the American National Bank and Trust Company of Shawnee, Oklahoma, and in support of its Application shows the court:

1. On October 23, 1973, Applicant obtained judgment in the District Court of Pottawatomie County, Oklahoma, in the amount of $83,378.87 against Parker Square, Inc. and judgment foreclosing its mortgage to satisfy said judgment; February 13, 1974, the District Court of Pottawatomie County, Oklahoma issued an Execution and Order of Sale and pursuant thereto the Sheriff of Pottawatomie County, Oklahoma, set the date of said sale for March 19, 1974, at 10:00 a.m., all as described in Exhibit "A" attached hereto and incorporated herein by reference.

2. On February 28, 1974, Applicant acquired 9,325 shares of the only class of securities issued and outstanding

of Parker Square, Inc., which shares constitute approximately 50% of the total number of shares of said Corporation issued and outstanding. The Applicant was not informed of the Petition filed herein by the Debtor under Chapter X, and does not consent thereto.

3. Applicant as shareholder and judgment creditor will suffer irreparable damage if said sale is not allowed to be held.

4. Debtor seeks jurisdiction under Chapter X for purposes of delay only and not for the purposes intended by said Chapter X, and is not entitled to relief under said Chapter X.

Wherefore, applicant requests that the Court forthwith enter its order excluding the above described property from these Chapter X proceedings and dismissing said Petition and vacating its order entered herein March 15, 1974.

CLARKE & VAN WAGNER, INC.
By [illegible]

VERIFIED

STATE OF OKLAHOMA)
) SS.
COUNTY OF POTTAWATOMIE)

Jim Earls, being duly sworn, says that he is the Executive Vice President of the American National Bank and Trust Company of Shawnee, Shawnee, Oklahoma; that he has read the foregoing Application and is familiar with the contents thereof; and that the allegations and facts set out therein are true and correct as he verily believes.

s/ Jim Earls
Jim Earls

Subscribed and sworn before me this 18th day of March, 1974.

s/ Gertrude R. Zeinemann
GERTRUDE R. ZEINEMANN, N.P.
Notary Public

My Commission Expires:

My commission expires Jan. 27, 1977

CERTIFICATE OF SERVICE

I certify that on the 3 day of October, 1975, I forwarded by first class mail, three copies of the within and foregoing Brief of Respondent, American National Bank and Trust Company of Shawnee, to the following:

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